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JOHN F. DAVIS,

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 133

DANIEL ALTON WILLIAMS,

Petitioner,

—v.—

EUGENE M. ZUCKERT, Secretary of the Air Force, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The district court rendered no opinion. The opinion of the Court of Appeals is reported at 296 F.2d 416.

Jurisdiction

The judgment of the Court of Appeals was entered on November 9, 1961 (R. 102). On February 6, 1962, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to March 12, 1962 (R. 103). The petition was filed on March 7, 1962, and was granted on May 21, 1962 (R. 104).[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

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[1] A motion for leave to proceed *in forma pauperis* was filed and granted on the same dates (R. 104).

Question Presented

Where the issue on a veteran's appeal to the Civil Service Commission turns on the credibility of the witnesses against him and the employing agency admits command and control of those witnesses, do the provisions of Section 14 of the Veterans Preference Act and 5 C.F.R. §22.601, *et seq.*, authorize the employing agency to refuse to produce such witnesses at the hearing and to rely on their affidavits instead?

Statute and Regulations Involved

The pertinent portions of Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. §863, and the pertinent Regulations of the Civil Service Commission, 5 C.F.R., Part 22, are set forth in Appendix A, *infra*.

Statement of the Case

Petitioner, a permanent civil service employee with sixteen years of service (including periods of active and honorable military duty with the United States Air Force), was employed as a Recreational Supervisor at the Air Force Academy in Colorado Springs, Colorado (R. 4). On March 11, 1959, the Air Force issued a notice proposing petitioner's suspension and removal on grounds of attempted homosexual assaults upon three airmen and wilful damage to government property (R. 4-5, 16-17).[2] Two of the alleged attempted assaults were alleged to have

[2] Prior thereto, and on March 6, 1959, the Air Force Academy issued an order prohibiting petitioner from entering the academy grounds (R. 5). The order was made effective as of March 10, 1959 and remained continuously in effect during the entire processing of petitioner's proposed suspension and removal (R. 5-6, 18-19).

occurred while petitioner was on active duty with the Air Force and the third was alleged to have occurred while petitioner was a civilian employee at the Air Force Academy (R. 5).

Although petitioner denied and refuted the charges (R. 13, 20-28), he was placed in suspension status on March 13, 1959 (R. 29-30), and was discharged and removed from his position at the Air Force Academy on April 12, 1959 (R. 31-32). The departmental proceedings prior to removal afforded petitioner no hearing of any kind, nor any opportunity to confront and cross-examine the accusing witnesses.

Petitioner appealed to the Civil Service Commission under Section 14 of the Veterans' Preference Act (R. 7). On May 5, 1959, the Tenth Civil Service Region held a hearing to take evidence of petitioner's alleged misconduct. Petitioner repeatedly requested an opportunity to interrogate three airmen, two of whom were alleged victims of the homosexual attempts and who were then stationed at the Air Force Academy (R. 44, 47, 48). These requests were rejected (R. 7-8, 38, 44). The Air Force submitted its evidence against petitioner in affidavit form (R. 39, 51), and while admitting its ability to produce all three airmen, declined to do so on the grounds that: (1) "any testimony they could give would be repetitious" of their accusations; (2) "knowing the character and reputation of the airmen who were concerned in this matter, it is firmly believed that even had the officials of the Air Force Academy deemed it necessary for them to attend, neither [petitioner nor his counsel] could have discredited them upon cross-examination"; and (3) "there is a possibility that they could have made even more damaging statements about [petitioner's] conduct and behavior" (R. 85).

The Tenth Civil Service Region upheld the Air Force's refusal to produce the airmen. And despite petitioner's denial of the alleged acts of misconduct and the evidence which he proffered, including an attack on the credibility of his accusers (R. 44-45), petitioner's removal was sustained (R. 8, 39-41). In resolving the conflicting evidence against petitioner, the Regional Director stated:

> " • • • it is inconceivable that three different persons on three different occasions at wide intervals of time would make ficticious accusations of homosexual attempts against them by the same person unless such attempts did in fact occur. For this reason the conflicts in evidence as to whether or not [petitioner] made the homosexual attempts is resolved in favor of the U. S. Air Force Academy" (R. 39).

Petitioner then appealed to the Commission's Board of Appeals and Review (R. 50-55). The Board adopted the Regional Director's rationale and affirmed his decision (R. 56-59).[3]

Petitioner commenced this action *pro se* on June 6, 1960, by filing a complaint in the United States District Court for the District of Columbia (R. 1). On January 17, 1961, after a notice of appearance by counsel, an amended complaint was filed asserting jurisdiction under District of Columbia Code, §§11-305 and 11-306; 28 U.S.C. §§1331, 1332, and 2201; 5 U.S.C. §863, and the Fifth and Sixth Amendments to the Constitution of the United States (R. 3).

Subsequently, both sides moved for summary judgment. On March 14, 1961, the district judge granted respondents'

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[3] The Board of Appeals and Review failed to sustain the charge that petitioner had wilfully damaged government property (R. 58).

motion and dismissed the complaint (R. 68). On March 30, 1961, petitioner filed a notice of appeal to the United States Court of Appeals (R. 69). On November 9, 1961, the Court of Appeals affirmed the district court's order (R. 100-101).

Summary of Argument

The sole question presented by this case is whether a Government employee can be denied an opportunity to confront and cross-examine his accusers during a hearing before the Civil Service Commission in proceedings challenging his removal from employment under Section 14 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. §863. The employing agency, in this case the Air Force, admitted that the three key witnesses to petitioner's alleged misconduct were all airmen on active duty, and subject to its military control. Yet, it refused to produce them before the Tenth Civil Service Region because it unilaterally concluded that their testimony would not have aided petitioner's case (R. 85). The Court of Appeals held, on the authority of *Deviny* v. *Campbell* (C.A.D.C.), 194 F.2d 876, certiorari denied, 344 U. S. 826 (1952), that the "failure of the Air Force to produce such witnesses here can in no way be viewed as a denial of [petitioner's] statutory and procedural rights" (R. 101).

I.

The decision below was erroneous. Section 14 of the Veterans Preference Act, 5 U.S.C. §863, as distinguished from Section 6(a) of the Lloyd-Lafollette Act, as amended, 62 Stat. 354, 5 U.S.C. §652(a), requires the Government to produce for cross-examination the persons whose affidavits supplied the factual basis for dismissal. So much is clear from the legislative history of Section 14 of the

Veterans Preference Act and the Civil Service regulations (5 C.F.R. §22.601, *et seq.*) promulgated by the Commission.

II.

It is now settled that if dismissal from Government employment be based on a defined procedure, even though generous beyond the requirements that bind the agency, that procedure must be scrupulously observed. *Service* v. *Dulles,* 354 U. S. 363 (1957). Since the Civil Service regulations which governed petitioner's appeal (5 C.F.R. §22.601, *et seq.*), required the Air Force to produce at the appeal hearing the witnesses whose affidavits formed the basis for petitioner's removal, it is plain, wholly apart from the requirements of the statute, that petitioner's removal was invalid. *Vitarelli* v. *Seaton,* 359 U. S. 535, 544-545 (1959).

ARGUMENT

I.

In *Deviny* v. *Campbell* (C.A.D.C.), 194 F.2d 876, certiorari denied, 344 U. S. 826 (1952), the Court of Appeals for the District of Columbia held that neither Section 14 of the Veterans Preference Act nor the regulations governing employee appeals to the Civil Service Commission required the employing agency to produce witnesses to testify in support of the charges and that it could submit affidavits or statements from such persons instead. This interpretation of the statute and applicable Civil Service regulations (5 C.F.R. §22.601 *et seq.*) has been followed by the court below in this (R. 101) and other cases.[4]

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[4] *E.g., Green* v. *Baughman* (C.A.D.C.), 243 F.2d 610, 613, certiorari denied, 355 U. S. 819 (1957); *Ellis* v. *Mueller* (C.A.D.C.), 280 F.2d 722, certiorari denied, 364 U. S. 833 (1960); *Shields* v. *Sharp* (C.A.D.C.), Appeal No. 15666, certiorari denied, 366 U. S. 917 (1961).

The holding of *Deviny* that nothing in the Veterans Preference Act "indicates an intention to require a hearing of the adversary type, with compulsory confrontation by witnesses" (194 F.2d at 880) is based on a misreading of the Congressional purpose. Section 14 of the Veterans Preference Act, although modeled on Section 6 of the Lloyd-Lafollette Act of 1912, 37 Stat. 555, 5 U.S.C. §652, was designed to provide "special preferences to veterans". *S. Rep. 907,* 78th Cong., 2d Sess., 3 (1944); *H. R. Rep. No. 1289,* 78th Cong., 2d Sess., 4 (1944); 90 Cong. Rec. 3503 (1944).[5] Instead of notice of the charges preferred, Section 14 required notice with reasons 30 full days in advance of the proposed removal.[6] And instead of an opportunity to "personally [answer the charges] in writing", the veteran's answer could be made personally as well as in writing.[7] Most important, the new act eliminated the Lloyd-Lafollette provision making cross-examination of witnesses, trial, or a hearing a matter for the discretion of the removing officer, and substituted therefor, an appeal to the Civil Service Commission with the right to make an appearance either personally or by representative.

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[5] It was first introduced as Section 9 of H. R. 6497, 75th Cong., 1st Sess. (1937); reintroduced as Section 9 of H. R. 5147, 76th Cong., 1st Sess. (1939), and finally introduced and passed as Section 14 of H. R. 4115, 78th Cong., 2nd Sess. (1944). The legislation which was enacted in the 78th Cong., represented a compromise between the versions sponsored by the three major veterans organizations in the prior congresses. *Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115,* 78th Cong., 2nd Sess., 8 (1944). Section 14 of H. R. 4115, 78th Cong., 2d Sess. (1944) was the version originally sponsored by the Veterans of Foreign Wars as Section 9 of H. R. 6497, 75th Cong., 1st Sess. (1937). *Hearings before House Committee on Civil Service on H. R. 5558, H. R. 5821 and H. R. 6497,* 75th Cong., 1st Sess., 95 ff. (1937).

[6] *Stringer* v. *United States* (C. Cls.), 90 F. Supp. 369.

[7] *Washington* v. *United States* (C. Cls.), 147 F. Supp. 284, certiorari dismissed, 335 U. S. 801 (1957).

The meaning of the appeal provision was explained when Section 14 of the Veterans Preference Act was first before Congress in 1937.[8] The legislative representative of the Veterans of Foreign Wars testified that the "purpose of that [section], as is apparent, is to prevent any man from being let out without good cause shown, and he would be let out only after a proper hearing. * * * It would protect veterans from being discharged for, shall I say, personal reasons, and on the other hand, it will not absolutely prohibit a supervisory officer from discharging a man for cause, but it does give the veteran an opportunity to defend himself by trial." *Hearings before the House Committee on H. R. 5558, H. R. 5821 and H. R. 6497,* 75th Cong., 1st Sess., 118 (1937).[9]

The contemporaneous administrative construction of Section 14's appeal provision is set forth in the Civil Service regulations, which are substantially the same now as when first issued,[10] and which contemplate an adversary type of administrative hearing at the appeal level. Cf. *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959). These regulations provide that the "employee has a right to appear at the hearing on his appeal * * * ", that the "agency has a right to participate in such a hearing", and that "[b]oth parties shall have the right to produce witnesses" (5 C.F.R. §22.601); that "[o]pportunity will be afforded for the introduction of evidence (including testimony and statements by the employee * * * and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses" (5 C.F.R. §22.603); and that "testimony at hearings shall be under oath" (5 C.F.R. §22.605).

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[8] *Op. cit. supra,* ftn. 5.

[9] See also *Hearings before House Committee on Civil Service on H. R. 5101 and H. R. 5147,* 76th Cong., 1st Sess., 69-70 (1939).

[10] See Departmental Circular No. 507, issued November 4, 1944.

The contemporaneous administrative construction, as set forth above, was ignored when the court below, following *Deviny* v. *Campbell* (194 F.2d, at 879), concluded that, inasmuch as 5 C.F.R. §22.607 provided that the Commission "is not authorized to subpoena witnesses" and that the employee and the employing agency "must make their own arrangements for the appearance of witnesses", the failure to produce witnesses at the hearing in no way violated petitioner's rights (R. 101). This interpretation of 5 C.F.R. §22.607 is erroneous. Section 22.607 of the Commission's regulations must be read together with §22.601, which provides that both the employee and the agency have a right to participate in the appeal hearing and that "[b]oth parties shall have the right to produce witnesses." When so read, §22.607 means that, since the Commission is not authorized to subpoena witnesses, the employee and the employing agency must make their own arrangements for the appearance of *their own* witnesses. Otherwise, the regulations providing opportunity "for the cross-examination of witnesses" (5 C.F.R. §22.603) and requiring that "testimony at hearings shall be under oath" (5 C.F.R. §22.605) would be rendered meaningless, as in large part they have been since *Deviny* v. *Campbell* was decided.

The statute, the legislative history, and the contemporaneous administrative construction by the Civil Service Commission, all demonstrate that Congress intended to provide "additional" and "special" preferences for veterans[11] and that Section 14 of the Veterans Preference Act, as distinguished from Section 6(a) of the Lloyd-Lafollette Act, 5 U.S.C. §652(a), requires the Government to produce for cross-examination the persons whose affidavits supplied the factual basis for dismissal.

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[11] *Hilton* v. *Sullivan*, 334 U. S. 323, 338-339 (1948).

II.

In the court below, petitioner contended that, apart from the provisions of the statute, the Air Force was required by 5 C.F.R. §22.601, *et seq.*, to produce at the hearing the three airmen who submitted the affidavits upon which the Air Force relied, and on whose credibility petitioner's removal turned (R. 8, 39, 58). All three airmen were on active duty, subject to control of the Air Force (R. 44), but were not produced to testify, because, *in the judgment of the Air Force,* their affidavits could not be impeached on cross-examination (R. 85). The court below held, on the authority of *Deviny* v. *Campbell,* that the Air Force was not required to produce them (R. 101).

In the decade since *Deviny* was decided, this Court has evolved the rule that, if dismissal from government employment be based on a defined procedure, even though generous beyond the requirements that bind the agency, that procedure must be scrupulously observed. *Service* v. *Dulles,* 354 U. S. 363 (1957). "This judicially evolved rule of administrative law is now firmly established • • • ". *Vitarelli* v. *Seaton,* 359 U. S. 535, 547 (1959).[12]

The regulations promulgated by the Civil Service Commission under Section 14 of the Veterans Preference Act, and which governed petitioner's appeal to the Commission (5 C.F.R. §22.601 *et seq.*), required the Air Force to produce at the hearing the three witnesses whose affidavits formed the basis upon which petitioner's removal was upheld. So much is apparent from *Vitarelli* v. *Seaton,* 359 U. S. 535, 544-545 (1959), where this Court construed Section 21(c)(4) of Interior Department Order 2738 (which gave an employee the right to "cross-examine any wit-

[12] Frankfurter, Clark, Wittaker and Stewart, JJ., dissenting in part.

ness offered in support of the charges"), as requiring the Interior Department to call as witnesses all "non-confidential informants" who furnished information against the employee upon which the agency relied. In the instant case, Section 22.603 of the Commission's regulations provides that, during the hearing, "opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses." (5 C.F.R. §22.603).

As matters now stand, the *Deviny* rule makes veterans appeal hearings before the Commission, where both parties are granted the right to produce witnesses, introduce evidence, and cross-examine witnesses, into hearings where the employee submits his evidence by testifying under oath, and the employing agency submits its evidence by furnishing affidavits. The effect of *Deviny*, therefore, has been to write the provision of 5 C.F.R. §22.603, granting the employee opportunity "for the cross-examination of witnesses", out of the regulations entirely.

The foregoing makes clear that this case is controlled by *Vitarelli* v. *Seaton* and that, wholly apart from the requirements of the statute, petitioner's removal was taken in violation of 5 C.F.R. §22.601, *et seq.*

CONCLUSION

By reason of the foregoing, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

Veterans' Preference Act, as amended, 58 Stat. 390, 5 U.S.C. §863:

Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit

its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

Title 5, Chapter 1—Civil Service Commission Part 22—"Appeals of Preference Eligibles under the Veterans' Preference Act of 1944" (5 C.F.R. §22):

Subpart C—Employee Appeals

§22.301. Right of appeal. An employee may appeal to the Commission from any decision of an administrative officer to take adverse action.

Subpart D—Commission Action on Initial Appeal

§22.402. Right to a hearing. The employee shall have a right to a hearing before the office of the Commission undertaking initial adjudication of his case. This shall be the only opportunity for hearing as a matter of right. The employee shall be advised of his right to a hearing and shall express his desire in writing.

Subpart F—Hearings

§22.601. Right to appear at hearing. An employee has a right to appear at the hearing on his appeal, personally or through or accompanied by his representative, before the office of the Commission handling the appeal. The agency has a right to participate in such a hearing. Both parties shall have a right to produce witnesses.

§22.602. How conducted. The hearing will be informal and will be conducted by a representative of the Commission.

§22.603. Introduction of evidence. Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses.

§22.604. Rules of evidence. Rules of evidence will not be strictly applied during hearings, but the Commission representative in charge of the hearing shall use reasonable discretion to exclude irrelevant or unduly repetitious testimony.

§22.605. Testimony taken under oath; record of hearings. The testimony at hearings shall be under oath. The office of the Commission handling the appeal shall determine how the hearing will be recorded. If the hearing is recorded verbatim, the reporter's transcript shall be made a part of the record of the proceeding and a copy shall be furnished to each party. When the hearing is not recorded verbatim, the presiding officer shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by all parties concerned, the summary shall constitute the report of the hearing and shall be made a part of the record. A copy shall be furnished to each party. Should the presiding officer and the parties fail to agree on the summary, the parties shall be permitted to submit, in writing, exceptions to any part of the summary. Such exceptions shall be considered in connection with the making of the finding and recommendation.

§22.606. Limitation on attendance at hearings. Hearings shall not be open to the general public or the press. Attendance shall be limited to persons determined by the Commission to have a direct connection with the appeal.

§22.607. Appearance of witnesses. The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses.